

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the Licenses
FACT.
of Gem Lake Properties, Inc.,
AND
d/b/a Gallivan's Bar
RECOMMENDATION

FINDINGS OF

CONCLUSIONS,

The above-entitled matter came on for hearing before Barbara L. Neilson, Administrative Law Judge, on February 2, 1993, at 9:00 a.m. in the fourth floor meeting room of the Main Library, 90 West Fourth Street, St. Paul, Minnesota. Philip B. Byrne, Assistant City Attorney, 800 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul. Earl P. Gray, Attorney at Law, Gray & Malacko, 386 North Wabasha Street, 654 Capital Centre, St. Paul, Minnesota 55102, appeared on behalf of the Licensee, Gallivan's Bar.

This Report is a recommendation, not a final decision. The City Council of the City of St. Paul will make the final decision after a review of the record. The City Council may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Section 310.05 of the City's Legislative Code, the City Council will afford the Licensee an opportunity to present oral or written arguments to it prior to taking final action. The parties should contact Philip B. Byrne to ascertain the procedure for filing such argument or appearing before the Council.

STATEMENT OF ISSUE

The issue in this proceeding is whether the Licensee permitted the consumption or display of liquor upon its premises after hours or failed to hold its premises open to inspection and examination by the police on October 11, 1992, contrary to St. Paul Legislative Code 310.12 and 409.07(c), and, if so, whether adverse action should be taken by the City with respect to any of the licenses held by the Licensee.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Gallivan's Bar is a food and liquor establishment located at 354 Wabasha Street North in downtown St. Paul. Gallivan's currently holds an on-sale Class A liquor license, a Sunday on-sale liquor license, a Class 2 entertainment license, and a Class D restaurant license. All of these licenses are set to expire on April 30, 1993.

2. Gallivan's is a fairly large establishment which, from front door to back door, occupies approximately one-half of a city block. The middle part of the bar itself is roughly equidistant from the back and front doors. The back door to Gallivan's contains a peephole and leads to the Victory Parking Ramp. There are numerous dents on the exterior side of the back door.

A twenty-foot hallway connects the back door to the remainder of Gallivan's. The front door does not contain a peephole or any window. There is a separate set of wooden interior doors inside the front door. These interior doors are customarily kept closed except during changes of seasons. See Gallivan's Exs. 1-10.

3. During the evening of Saturday, October 10, and the early morning hours of Sunday, October 11, 1992, a wedding reception was held at the Raddison Hotel in downtown St. Paul for Nancy Guy, an employee of Gallivan's. Alcoholic beverages were available at the reception. A private party was held in a hotel suite following the end of the formal reception.

4. Anne Flodquist, Gallivan's Bar Manager (who was not scheduled to work on October 10), and Glenn Gierok, the husband of Mary Gierok, Gallivan's General Manager, attended the formal wedding reception at the Raddison. Both Ms. Flodquist and Mr. Gierok consumed some alcohol at the wedding reception. Mary Gierok was working at Gallivan's during the evening of October 10. She joined her husband and Ms. Flodquist at the wedding reception at approximately 11:30 p.m. Ms. Flodquist, Mr. Gierok, and Ms. Gierok did not attend the private party following the formal reception. They returned to Gallivan's at approximately 12:50 a.m. on October 11.

5. Vivian Leon and Shannon Wenum-Zontello, who are also employed by Gallivan's, attended both the formal wedding reception and the private party. Ms. Leon arrived at Gallivan's prior to 1:20 or 1:30 a.m., the time that the general patrons were cleared out. She was intoxicated and remained at Gallivan's for several hours. Ms. Wenum-Zontello, who was also intoxicated, came back to Gallivan's for a brief time between 2:00 and 2:30 a.m. in order to pick up some personal belongings. She may have entered Gallivan's through the back door at a time when it was propped open with an ashtray. Gallivan's

head cook, David Drummond, who had a key to the back door, also came back to Galli van's after hours to retrieve his jacket.

6. At approximately 1:45 or 2:00 a.m., Ms. Gierok went home because she was not feeling well. Ms. Flodquist agreed to close up the bar for Ms. Gierok. In addition to attending to closing chores, Ms. Flodquist spent some time examining the Halloween decorations that had arrived that day. She also spent approximately fifteen minutes talking to Mr. Drummond and trying to defuse an argument between Mr. Drummond and Ms. Leon. Mr. Gierok remained at Gallivans so that he could escort female employees to their cars after the closing was complete. Linda Hess, who was the bartender at Gallivan's that evening, also remained to assist in the clean-up and closing chores. It frequently takes until 2:00 a.m. or, on busy nights, until 2:30 a.m. to close up.

7. Ms. Flodquist called a friend, Monica Kannel, at approximately 2:00 a.m. on October 11 and asked her if she could give her a ride home. Ms. Kannel arrived at Gallivan's at approximately 2:20 a.m. She sat at the bar and waited for Ms. Flodquist.

8. A band composed of musicians David LeMire and Gregory Fagan has played at Gallivan's during the weekends for the past four years. Mssrs. LeMire and Fagan also played at Ms. Guy's formal wedding reception on October 10 from 8:00 p.m. to approximately midnight. They started packing up their equipment at approximately 12:30 a.m., and proceeded to load it onto their truck parked outside the hotel. Mssrs. LeMire and Fagan arrived back at Gallivan's between 2:15 and 2 30 a.m., parked their truck in the rear, and hauled their gear back into Gallivan's using a key they had to the back door. They placed the equipment on the dance floor located approximately forty feet from the back door. They decided to set up their keyboard instruments that night rather than waiting until the next day so that they would be able to haul the large empty keyboard cases home in the pick-up truck that evening.

9. Ms. Flodquist decided to wait until the band members were finished unloading their equipment and re-loading their cases before locking up and setting the alarms. She also felt responsible for Ms. Leon, who was intoxicated. Ms. Flodquist, Ms. Hess, Ms. Leon, Ms. Kannel, and Mr. Gierok sat in the middle area of the bar while they waited. Ms. Flodquist and Ms. Leon were drinking coffee.

10. St. Paul police officers Linda Wilson and Kenneth Sass were dispatched to Gallivan's on October 11 in response to a complaint regarding an after-hours party. They arrived at Gallivan's at approximately 3:20 a.m. and went to the back door. They could hear faint music coming from inside the bar. Officer Wilson knocked on the back door of the bar with the end of her metal flashlight sufficiently hard that dents were left in the door. The flashlight is approximately 18-20 inches long and weighs 2-3 pounds. Officer Wilson continued knocking for three or four minutes. She and Officer Sass then went to the front door to the bar. Officer Wilson knocked on the front door with her flashlight and Officer Sass knocked with his steel baton for two to five minutes.

11. Mr. Fagan heard the knocking on the front door when he went to the bathroom. The bathrooms are located near the front of the dining area, close to the front door. He called out, "Who is it?" Officers Wilson and Sass responded, "Police--open the door." Mr. Fagan then told Ms. Flodquist, and Ms. Flodquist went to the front door.

12. At about this time, Officer Wilson returned to the back door of the bar and saw Mssrs. LeMire and Fagan coming out the back door. Ms. Wenum-Zontello was also present. The back door locked behind these individuals as they left Gallivan's. Officer Wilson went back to the back door and continued knocking. Officer Sass remained at the front door and used his pocket radio to contact "Channel 5," which is part of the Police Department's communications center. He requested that a telephone call be placed to Gallivan's in order to tell them that the police were there and the door should be opened.

13. When Ms. Kannel was returning from the bathroom, she heard the phone ringing and answered it. A female caller said that the police were at the front door and would like to be let in. Ms. Kannel was not sure whether or not the call was a prank. She said nothing to the caller and hung up. She then told Ms. Flodquist about the call. Ms. Flodquist was standing in the front vestibule with Mr. Fagan at the time, and Mr. Fagan was telling her that someone was at the front door.

14. Ms. Flodquist talked to Officer Sass through the door and asked him to step around to the back door. She wanted to be able to use the peephole in the back door to verify that Officer Sass was in fact a police officer. Ms. Flodquist was then told of pounding at the back door. She went to the back door but did not see anyone. She returned to the front door and opened the door for Officer Sass. Officer Sass told her to wait there and said that he would be right back. He started to walk around to the back to get Officer Wilson. Ms. Flodquist waited two or three minutes and was again told of pounding at the back door. She let go of the front door in order to return to the back door, and the automatic locking mechanism on the front door caused it to lock.

15. Ms. Flodquist opened the back door of Gallivan's for Officer Wilson. Officer Wilson came in and asked Ms. Flodquist to go to the front door to let Officer Sass in. Ms. Flodquist opened the door for Officer Sass and told him to walk into the entry before her. Officer Sass said, "No, after you." Ms. Flodquist said, "No, after you." A similar exchange occurred two or three more times. Officer Sass then took Ms. Flodquist by the arm and forcibly assisted her through the door ahead of him.

16. Approximately ten minutes elapsed from the time the police officers began knocking until they gained entry. City Ex. 6. About 1-112 minutes elapsed from the time Ms. Flodquist learned from Mr. Fagan that someone claiming to be a police officer was at the front door until the time that she opened the front door for Officer Sass, and another 1-112 minutes elapsed before the back door was opened for Officer Wilson.

17. Four persons--Mr. Gierok, Ms. Kannel, Ms. Hess, and Ms. Leon--were seated at the bar when the officers arrived. A pot of coffee and some coffee cups were on the bar at the time the officers entered Gallivan's. There were no other drinks on the bar or in the surrounding area at the time the officers entered the bar.

18. Before the police officers were heard knocking at the door, music was being played on the tape deck located at one end of the bar near the middle of

Gallivan's. The volume was set at a fairly high level which made normal conversation difficult and required that people speak up to be heard. Ms.

Flodquist ordered that the volume be turned down prior to the time she let

Officer Wilson in the back door.

19. No one present in the bar heard the police officers knocking at the front or back doors of the bar prior to the time that Mr. Fagan passed by the front door, heard the knocking, and spoke to the officers.

20. No alcohol was in fact consumed by those who were present in Gallivan's after the patrons were cleared out on October 11, 1992.

Ms. Leon

and Ms. Flodquist drank some coffee while at Gallivan's that evening.

21. Police Sargeant Rogers came to Gallivan's at Officer Wilson's request. He told Officer Wilson to write an information report since there

was no alcohol present on the bar when the officers arrived. No tickets were issued by the officers.

22. Ms. Flodquist has had problems in the past with people knocking on the doors or waiting by the front door and threatening her when she left the bar. She is also concerned about crime in the area surrounding Gallivan's.

23. On one occasion during the winter of 1991-92, Mr. LeMire walked a female employee of Gallivan's to her car after closing time. Although he pounded on the front door of Gallivan's for twenty minutes, no one came to let him in. He finally gained entrance only when someone else left.

24. On November 24, 1992, Assistant City Attorney Philip B. Byrne issued a Notice of Hearing indicating that a hearing would be held on February 2, 1993, which might lead to adverse action against all of the licenses held by Gallivan's. The Notice of Hearing included the following allegations:

On October 11, 1992, at or about 2:45 a.m., two police officers were denied admittance to Gallivan's Bar when they sought to investigate an after hours party at the Bar. Despite the knocking of the officers at both the front and back doors, and despite making voice and telephone contact with a person or persons inside the Bar, the officers were denied admittance for at least ten minutes and perhaps longer. When the officers were finally admitted, they did not observe anyone consuming alcoholic beverages. However, from their observations and the circumstances it would be reasonable for the City Council to determine and conclude that persons had been consuming alcoholic beverages in violation of the ordinance. These actions violate both Section 409.07(c) of the Saint Paul Legislative Code relating to consumption or display of alcoholic beverages after hours, and Section 310.12 of the code, relating to inspection of licensed premises, because of the undue delay in admitting the officers.

The Notice of Hearing also set forth various procedural information and informed the Licensee of various rights and opportunities available through the hearing process.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The City Council and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 14.55 (1992) and Chapter 310.05 of

the St. Paul Legislative Code. The Notice of Hearing issued by the City was proper and all applicable substantive and procedural requirements have been fulfilled.

2. The City has the burden of proving by a preponderance of the evidence the alleged violations of ordinance or statute.

3. Section 310.12 of the St. Paul Legislative Code provides as follows:

The premises, facilities, place, device or anything named in any license issued pursuant to any provision of the Saint Paul Legislative Code or other law shall at all times while open to the public or while being used or occupied for any purpose be open also to inspection and examination by any police, fire, or health officer or any building inspector of the city, as well as the inspector.

4. Section 409.07(a) of the St. Paul Legislative Code provides in pertinent part that "[n]o sale of intoxicating liquor shall be made after 1:00 a.m. on Sunday nor until 8:00 a.m. on Monday." Section 409.07(c) of the St. Paul Legislative Code provides that "[n]o person shall consume or display or allow consumption or display of liquor upon the premises of an on-sale licensee at any time when the sale of such liquor is not permitted."

5. Section 409.14 of the St. Paul Legislative Code provides that "[a]ny act by an clerk, barkeeper, agent, servant or employee of any licensee hereunder, in violation of this chapter, shall be deemed the act of the employer and licensee of such place as well as that of such clerk, barkeeper, agent, servant or employee, and every such employer and licensee shall be liable to all the penalties provided for the violation of same equally with the clerk, barkeeper, agent, servant, or employee."

6. The City failed to prove by a preponderance of the evidence that alcoholic beverages were consumed or displayed on Gallivan's premises after proper closing hours or that the premises were not properly open to examination or inspection by the police on October 11, 1992.

7. Because the City has not proven that the Licensee violated sections 310.12 or 409.07(c) of the St. Paul Legislative Code, adverse action is not appropriate in this case.

Based upon the foregoing Conclusions, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that the St. Paul City Council dismiss these proceedings against Gallivan's Bar and that no adverse action be taken against its licenses.

Dated this 4th day of March, 1993.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

It is respectfully requested that the St. Paul City Council serve its final decision upon each party and the Administrative Law Judge by first class

mail.

Reported: Taped, not transcribed (3 tapes).

MEMORANDUM

The City alleges that Galli van's violated the St Paul Legislative Code by permitting the consumption and display of alcohol after hours and refusing to admit police officers into the premises. The City argues that the facts and circumstances warrant the conclusion that those present in Gallivan's on October 11 intentionally refused to admit the police officers until ten to fifteen minutes had elapsed from the time they began knocking on the doors and that there is strong circumstantial evidence that those present had been drinking after hours.

The City must prove that violations of the Code have occurred by a preponderance of the evidence. Counsel for the City correctly asserts that this is a much easier standard to meet than the "beyond a reasonable doubt" standard applied in criminal matters. The Administrative Law Judge is, however, unable to conclude that the City has met its burden in this case. Because the police officers did not find any beer bottles, full or partially-filled drink glasses, or other evidence of consumption when they inspected the premises, there is no "hard" evidence that alcohol was in fact consumed after hours. There is not even any indication that the officers found unwashed drink glasses behind the bar. The City argues that it is inherently unbelievable to suppose that Ms. Flodquist, Ms. Hess, Ms. Leon, Ms. Kannel and Mr. Gierok sat in the bar area and visited over a period of 1-112 to 2-112 hours while only Ms. Leon had anything to drink (coffee).*

The inferences and assumptions which the City urges the Judge to make concerning after-hours drinking are simply not warranted in light of the credible testimony presented on behalf of Gallivan's denying that the alleged violations occurred. Because each of the individuals present had a good reason for being at Gallivan's that evening, the gathering does not of necessity take on the appearance of a "party." Ms. Flodquist and Ms. Hess were required to complete the closing chores, which could require that they work until 2:30 a.m. on a busy night. Ms. Flodquist also spent some time examining bar decorations and mediating an employee dispute. She was in charge that evening and was well aware of the requirements of the St. Paul Legislative Code with respect to after-hours consumption. She felt responsible for Ms. Leon, who was intoxicated, and wanted to ensure that the alarms were set after the band members were finished unloading their equipment. Mr. Gierok was waiting to escort the female employees of Gallivan's to their cars, and Ms. Kannel was waiting to give Ms. Flodquist a ride home. The witnesses who testified on behalf of Gallivan's consistently and adamantly denied that anyone drank alcohol after closing. While it is true that some of the persons present at the time the officers arrived had

been drinking or were intoxicated, that is explained by their presence earlier in the evening at a wedding reception and/or private party at which alcohol was available.

*As noted in the Findings above, Ms. Flodquist also drank coffee during this time period.

The Administrative Law Judge is also unable to conclude that the police officers were refused entry under the circumstances involved in this case or that there was an undue delay warranting an inference that those present were hurriedly removing any evidence of drinking. There was convincing testimony that no one present in Gallivan's heard the knocking prior to the time that Mr. Fagan passed by the front door on his way to the bathroom. The music was playing at a fairly high level on the bar's tape deck when the police officers started knocking on the doors. The officers testified that they could hear music playing through the back vent. The dents appearing on the back door, the size and lay-out of Gallivan's, and the position of the speaker provides further evidence to bolster the testimony that the knocking was initially not detected by those inside Gallivan's. The front door was opened for Officer Sass within 1 - 1 1/2 minutes of Mr. Fagan's conversation with the officers, and the back door was opened for Officer Wilson within another 1-1 1/2 minutes. Ms. Flodquist explained that she left the front door despite Officer Sass' directive to stay there because she had been informed that the police had urgently requested that she open the back door. She was in charge of Gallivan's that night, and it seems reasonable that she would have felt it necessary to go to the back door to handle the situation. Given the late hour and the incidence of crime in the area, it also seems reasonable that she allowed the front door to lock when she left. Both officers were in fact inside Gallivan's a very short time later, and the Judge is unable to interpret this situation to be a refusal to allow inspection within the meaning of section 310.12 of the Legislative Code.

B.L.N.